Supreme Court, U.S.
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In The
Supreme Court of the United States

ISSAM MOHAMAD GHAZALI,
Petitioner,

v.

ERIC H. HOLDER, JR., UNITED STATES ATTORNEY GENERAL,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

RONALD E. KAPLOVITZ, ESQ.
Counsel of Record
KAPLOVITZ & ASSOCIATES, P.C.
2057 ORCHARD LAKE RD.
SYLVAN LAKE, MICHIGAN 48320
(248) 333-3666
E-MAIL: rkaplovitz@aol.com

Attorneys for Petitioner

January 25, 2010

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTIONS PRESENTED

Did the Sixth Circuit Court of Appeals err in ruling that a time-barred political asylum application can still result in a frivolous finding pursuant to 8 U.S.C. § 1158(6)(d)?

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PETITION FOR WRIT OF CERTIORARI

Petitioner, ISSAM MOHAMAD GHAZALI asks that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

CITATION TO OPINIONS BELOW

The decision of the United States Court of Appeals for the Sixth Circuit, *ISSAM MOHAMAD GHAZALI, v. Holder*, Docket No., 08-4229 (6th Cir. 2009), is attached to this petition as **Appendix A**. The Decision of the Board of Immigration Appeals (hereafter referred to as "Board" or "BIA" in re: Issam Mohamad Ghazali No. 073577-947 (BIA Motion to Reopen Decision 8-29-2008), are attached to this Writ as **Appendix B**.

STATEMENT OF JURISDICTION

The Court of Appeals for the Sixth Circuit entered its judgment denying the timely submitted petition for review on October 29, 2009. The Petitioner did not seek rehearing before the Sixth Circuit Court of Appeals, but instead filed a Motion for Stay of Removal indicating Petitioner's intent to file a Petition for Writ of Certiorari before this Court. The Motion was granted on November 25, 2009 and the Order is attached herein as **Appendix E**.

This Honorable Court's jurisdiction is hereby invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Central to the matter at hand is the statutory interpretation of 8 U.S.C. § 1158(6)(d) which allows for the finding that a political asylum application was frivolously filed resulting in a permanent bar of admissibility for an alien.

STATEMENT OF THE CASE

In this action the Petitioner is requesting review by this Court of a Decision of the Sixth Circuit Court of Appeals denying a Petition for Review from an earlier Decision of the Board of Immigration Appeals finding that your Petitioner filed a frivolous political asylum application.

A. The Nature of the Action

The sole issue before this Court is whether a time-barred asylum application can still result in frivolous finding pursuant to 8 U.S.C. § 1158(6)(d); § 208(6)(d) of the INA.

The Petitioner is a male, native and citizen of Lebanon. He was born on August 24, 1960. He was admitted to the United States on or about July 21, 1999 and has essentially remained in the United States continuously since that time. In addition Petitioner currently has four (4) United States citizen children and is the beneficiary of an immigrant petition filed by his U.S. citizen wife. If the frivolous finding remains, Petitioner is permanently banned from obtaining an immigrant beneficiary.

B. The Court of Proceedings and Disposition Below

Petitioner was placed into removal proceedings based upon a Notice to Appear dated October 7, 2003. The essential and crucial fact involving this Notice to Appear was an allegation that Petitioner had remained in the United States beyond June 22, 2001 without authorization in violation of 8 U.S.C. § 1227(a)(1)(B); § 237(a)(i)(B) of the INA.

At a Preliminary Hearing, Petitioner conceded the allegations contained in the Notice to Appear and then proceeded to file an Application for Relief pursuant to the filing Immigration Form I-589, which form is used for political asylum pursuant to 8 U.S.C. § 1158; § 208 of the INA, as well as withholding of removal pursuant to 8 U.S.C. § 1184; § 214 of the INA, and finally for relief pursuant to the United Nations Convention Against Torture pursuant to 8 C.F.R. § 1208.6. As noted in the Oral Decision, Petitioner at that time conceded that his Application for Asylum was not timely and that he was not actually seeking that type of relief.

On September 6, 2006 Petitioner filed an Amendment to his I-589 Application for Asylum essentially claiming that changed country conditions permitted his Application for Asylum to be considered. Specifically 8 U.S.C. § 1158(a)(2)(D) provides that an alien can claim asylum if conditions in his country have changed. This statute is an exception to the general one (1) year time limit as required in 8 U.S.C. § 1158(a)(2)(B); § 208(a)(2)(B) of the INA.

An Evidentiary Hearing occurred on September 20, 2006 where Petitioner's claims for relief were considered and heard by the Court. The Court noted the relief requested being asylum, withholding under 8 U.S.C. § 1231(b)(3), § 241(b)(3) of the INA. and withholding under the Torture Convention . After a brief discussion, the Court then immediately ruled that Petitioner's Asylum Application was untimely. The Court then continued with its lengthy discussion as Petitioner's two (2) withholding claims are not affected by any possible time bar issues.

Notwithstanding the asylum time bar, the Court then considered the frivolous filing issue. The Court determined that the only possible frivolous issue in this case was the fact that it did not accept Petitioner's credibility, believing that he testified inconsistently with his own testimony and others. The Court then noted that it was going to find that the Application was frivolous, but then failed to actually and properly state that in its Oral Decision. However, the Court did in the actual Order form check off the appropriate box for frivolous asylum application.

Petitioner then timely appealed this matter to the Board of Immigration Appeals who affirmed the Immigration Judge's Decision in total. The Board of Immigration Appeals in its decision specifically noted that the frivolous finding was based on the oral testimony of Petitioner at the Evidentiary Hearing.

Subsequent to said ruling, Petitioner filed a Motion for Reconsideration with the Board of Immigration Appeals regarding the frivolous asylum finding.

On August 29, 2008, the Board of Immigration Appeals issued a Decision denying Petitioner's Application for Reconsideration with regard to the time barred frivolous asylum finding. A review of the BIA Decision clearly reflects the fact that they accept that an immigration judge's decision that a frivolous finding can be had in a situation where an immigration judge has determined that an asylum application is untimely and/or subject to a bar as occurred in the case herein

Petitioner filed a timely Request for Review with the Sixth Circuit Court of Appeals from the Board of Immigration Appeals with regard to the Motion for Reconsideration. Petitioner is now requesting that this Honorable Court strike the frivolous finding ruling and remand this case back to the Immigration Court and/or Board of Immigration Appeals based upon the fact that Petitioner is currently eligible for and has filed for supplemental relief, to-wit: Adjustment of Status based upon United States relatives petition.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit Court's decision in this case is directly in opposition to the Third Circuit Court in *Luciana v. Attorney General of the U.S.*, 502 F.3d 273, 280 (3rd Cir. 2007). As a result there is a direct conflict on the issue between these two circuit courts as to whether a time-barred asylum application can result in a frivolous finding pursuant to 8 U.S.C. § 1158(6)(d).

ARGUMENT

WHETHER THE SIXTH CIRCUIT COURT OF APPEALS ERRED IN RULING THAT T TIME-BARRED POLITICAL ASYLUM APPLICATION PURSUANT T0 § 1158(a)(2)(B) CAN STILL RESULTIN A FRIVOLOUS FINDING PURSUANT TO 8 U.S.C. § 1158(6)(d)?

Prior to the Sixth Circuit's decision herein, the only other court to have directly considered this issue is the Third Circuit, in *Luciana v. Attorney General of the U.S.*, 502 F.3d 273, 280 (3rd Cir. 2007). Specifically, the *Luciana* Court stated:

> In the case at bar, the falsehood had neither the natural tendency nor the capability of influencing the decision of either the Asylum Officer, the IJ or the BIA. Because Petitioner's asylum application was untimely, she could not be granted asylum unless her case fell under an exception to the time limit. *See* 8 U.S.C. §§ 1158(a)(2)(B), (a)(1). Once it became clear that no exception applied, her application had to be rejected as time-barred. Evidence going to the merits of the application – such as Petitioner's story about the stabbing – was of no consequence, no matter how persuasive or compelling it might have been. Such evidence was totally incapable of influencing the decision makers, and therefore it was not material. From all this there is but one logical conclusion: because petitioner's statement was not material, it was an error of law to conclude that her application was frivolous.

Upon review of the *Luciana*, *Id.* decision, it is clear that the court's decision is based upon fundamental fairness as well as basic jurisdiction.

In the paragraph quoted above, the court clearly states that if an asylum application is time-barred, the court has no option but to reject the application, no matter how compelling Petitioner's story may be. Essentially, the time bar creates a situation where the courts cannot consider anything to do with asylum, good, bad or frivolous.

The time bar rule acts to divest the court from having jurisdiction to consider anything to do with an asylum claim. To reach any other conclusion would essentially allow immigration courts to pick and choose how and when to consider utilizing the time bar rule to accomplish a desired outcome.

A detailed review of the statutes in question confirms the lack of jurisdiction argument – 8 U.S.C. § 1158(a)(2); § 208(a)(2) of the INA states as follows:

> (a) **Authority to Apply for Asylum**
>
> **(1) In general**
>
> Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 235(b).

Clearly, this statute allows for filing of an asylum claim; however, there are four (4) limitations under 8 U.S.C. § 1158(a)(2); § 208(a)(2) of the INA. The relevant limitation in this case is 8 U.S.C. § 1158(a)(2)(B), which states as follows:

> **(B) Time limit**
>
> Subject to subparagraph (D), paragraph (1) shall not apply to an alien unless the alien demonstrates by clear and convincing evidence that the application has been filed within 1 year after the date of the alien's arrival in the United States.

The essence of these two statutes, read together, indicates that if there is a "time limit" issue, the alien does not have the authority to apply for asylum. Once it is determined that an alien does not have the "authority to apply for asylum," it means that an asylum application has not been filed and a frivolous finding becomes impossible.

Upon review of the Decision of the Sixth Circuit herein, it is clear that they relied upon the language of 8 U.S.C. § 1158(d)(6) concluding that statutory language allowed the frivolous finding on a time-barred asylum application. Specifically this paragraph states as follows:

> (6) Frivolous applications
>
> If the Attorney General determines that an alien has knowingly made a frivolous application for asylum and the alien has received the notice under paragraph

> (4)(A), the alien shall be permanently ineligible for any benefits under this Act, effective as of the date of a final determination on such application.

The above statute specifically describes that a frivolous finding may be made assuming that notice was properly given to the applicant when an asylum application is actually made. In this case however because of the earlier statutory definitions regarding time limits, Petitioner's Asylum Application was never actually filed with the Immigration Court. This is based upon the ruling of the Immigration Judge that the Petitioner had not established change of country conditions and as such the asylum application was in fact time-barred.

The Sixth Circuit justifies its decision by citing immigration regulations, to-wit: 8 C.F.R. § 1208.20 which allows an immigration judge to make a determination of a frivolous application. The Court then indicates that *Chevron* deference applies to this case in that the Board's interpretation of the Immigration & Nationality Act should be given deference to ambiguous statutory terms. Citing *Nagusi v. Holder*, ____ U.S. ____ 129 S. Ct. 1159 (2009). See also *Chevron, U.S.A., Inc. v. Natural Res. Def. Council,* 467 U.S. 837 (1984). The problem with the Sixth Circuit Court's Decision is that the statutes in question are not ambiguous in any way, shape or form. The rules and regulation regarding the ability to file an asylum application are clearly stated in 8 U.S.C. § 208 et seq. If your application is time-barred and you are unable to establish changed country conditions, there is no ability to file an application for

asylum. There being no asylum application, a frivolous finding is not possible.

The Sixth Circuit then goes on to consider two cases to support their position.

The first case is *Lazar v. Gonzalez*, 500 F.3d 469 (6th Cir. 2007), in which this Court ruled that a withdrawn asylum application can still result in a frivolous asylum finding. Petitioner believes that this Court's decision is correct but has relevance to this case. In *Lazar, Id.*, the asylum application was in fact filed pursuant to 8 U.S.C. § 1158(a)(2); § 208(a)(2) of the INA, and none of the four (4) exceptions listed under 8 U.S.C. § 1158(a)(2); 208(a)(2) of the INA applied to the *Lazar* case. *Id.* As such, the Immigration Judge did in fact have jurisdiction to consider the asylum case and the related frivolous issue.

Unlike *Lazar*, Petitioner never had authority to even apply for asylum, due to the time bar. As a result, the Immigration Judge could not find that a frivolous asylum application was filed as no application was filed.

The second case that Respondent is likely to rely upon is *Mingkind v. U.S. Attorney General*, 468 F.3d 763, 768 (11th Cir. 2006). In that case, the Eleventh Circuit ruling was based on a different jurisdictional argument, citing the Code of Federal Regulations for the proposition that an immigration judge has sole jurisdiction over applications for asylum. 8 C.F.R. § 1003.14(b). (*Mingkind Id.* at pg 767-768).

A review of the *Mingkind* decision, *Id.*, fails to reflect that consideration was given to the arguments made in this case. Upon review of the *Mingkind* decision, *Id.*, it appears that they were persuaded by what they perceived as congressional intent to prevent frivolous asylum filings and the need to impose a sanction. *Mingkind Id.* at pg 768).

In fact, Congress has placed no such penalty upon either of the other two (2) types of relief for which Petitioner filed, to wit: Withholding pursuant to 8 U.S.C. § 1231(b)(3); § 208(b)(3) of the INA; and Withholding under the Torture Convention. Certainly Congress could have imposed a similar frivolous penalty in either of those situations had it so desired.

As to this issue of sanctions, the *Luciana*, *Id.*, court stated as follows:

> In the case at bar, the Immigration Judge found Petitioner to have committed a serious wrong: she ratified a false statement contained in her asylum application. This is a wrong we cannot condone. Immigration proceedings, like almost all legal proceedings, depend on the ability of decision-makers to find the truth. Lies undercut immigration proceedings just as they do proceedings in state and federal court. Without the truth, the judicial edifice turns to a house of cards.
>
> But Petitioner's misdeed will not go unpunished. Her asylum application has been denied. The IJ's order for her removal – issued, ultimately, because she voluntarily came forward to apply for asylum – stands. Any possibility she has of ever living legally and

permanently with her family in the United States now hangs on the willingness of the Attorney General to grant her a waiver. Such waivers are far from a certainty. *See, e.g., Howell v. INA*, 72 F.3d 288 (2d Cir. 1995) (holding that a district court lacked jurisdiction to review the Immigration and Naturalization Service's refusal to grant a waiver of a ground of inadmissibility in the case of a Jamaican woman married to a U.S. citizen. (*Luciana* at p. 284)

Petitioner herein will face a similar situation. Although an Immigrant Petition is now available to him, he will face difficulties in obtaining permanent resident status, either before the Immigration Judge (likely to be the same judge) or from the Department of Homeland Security should he proceed administratively in the United States or abroad.

CONCLUSION

For the reasons set forth above, the petition for writ of certiorari should be granted.

Respectfully submitted,

RONALD E. KAPLOVITZ, ESQ.
Counsel of Record
KAPLOVITZ & ASSOCIATES, P.C.
2057 Orchard Lake Rd.
Sylvan Lake, Michigan 48320

Attorneys for Petitioner

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APPENDIX A

RECOMMENDED FOR FULL-TEXT PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 08-4229

[Filed October 29, 2009]
Corrected October 30, 2009

ISSAM MOHAMAD GHAZALI, *Petitioner*,	)
v.	)
ERIC H. HOLDER, JR., United States Attorney General, *Respondent*.	)

On Petition for Review from an Order of the Board of Immigration Appeals. No. A95 457 939.

Argued: October 7, 2009

Decided and Filed: October 29, 2009

Before: DAUGHTREY, SUTTON and McKEAGUE, Circuit Judges.

COUNSEL

ARGUED: Ronald E. Kaplovitz, KAPLOVITZ & ASSOCIATES, P.C., Sylvan Lake, Michigan, for Petitioner. Patrick James Glen, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent. **ON BRIEF:** Ronald E. Kaplovitz, KAPLOVITZ & ASSOCIATES, P.C., Sylvan Lake, Michigan, for Petitioner. Patrick James Glen, UNITED STATES DEPARTMENT OF JUSTICE, Washington, D.C., for Respondent.

OPINION

SUTTON, Circuit Judge. Issam Mohamad Ghazali, a native and citizen of Lebanon, argues that, once an immigration judge determines that an asylum petition is time barred, the judge no longer has authority to determine that the application is frivolous. The Board of Immigration Appeals disagreed, and so do we.

I.

In 1999, Ghazali entered the United States on a non-immigrant visa with authorization to stay until 2001. When Ghazali overstayed his stay, the Immigration and Naturalization Service—now the Department of Homeland Security—initiated removal proceedings against him. In 2004, an immigration judge found him removable.

Two years later, Ghazali filed an application for asylum, withholding of removal and protection under the Convention Against Torture, all of which the immigration judge denied. The judge rejected Ghazali's withholding-of-removal and torture claims on the merits. He then found Ghazali's asylum application statutorily barred because Ghazali did not apply for asylum within one year of entering the country, *see* 8 U.S.C. § 1158(a)(2)(B), and because he previously received asylum in Switzerland, *see id.* § 1158(a)(2)(A). Even if the statutory bars did not preclude relief, the judge added, the asylum claim still failed on the merits because Ghazali did not provide credible testimony in support of it. Ghazali, the judge reasoned, testified inconsistently with his own application, the testimony of his brother and other documentary evidence, and offered no credible evidence to corroborate his version of events.

The immigration judge separately determined that Ghazali deliberately fabricated material portions of his testimony and that his asylum application was frivolous. *See* 8 C.F.R. § 1208.20. Before making the frivolousness finding, the immigration judge orally warned Ghazali about the consequences of making a frivolous asylum application. And at the hearing, after Ghazali testified inconsistently with the record evidence and with his brother's testimony, the judge gave him an opportunity to account for the discrepancies. Unpersuaded by Ghazali's efforts to account for these inconsistencies, the judge found that Ghazali deliberately made up material elements of his testimony, noting: (1) the testimony of Ghazali's brother contradicted Ghazali's statements that a gun battle occurred at his home in Lebanon before he fled the country; and (2) Ghazali's passport, which revealed

that he returned to Lebanon in 1992 and 1994, plainly contradicted Ghazali's testimony that, once he left Lebanon in 1986, he did not return until 1998 out of fear for his life. The frivolousness finding made Ghazali "permanently ineligible" for asylum. *See* 8 U.S.C. § 1158(d)(6).

The Board of Immigration Appeals affirmed the judge's decision in all respects. As to the frivolousness finding, the Board determined that the immigration judge complied with the prerequisites for making such a finding by warning Ghazali of the consequences of filing a frivolous application, giving him an adequate opportunity to explain himself, making a specific finding of frivolousness and pointing to sufficient evidence in the record to support the finding. *See Matter of Y-L*, 24 I&N Dec. 151, 155 (BIA 2007) (setting forth the procedure that must be followed before an immigration judge may deem an application frivolous).

Ghazali moved for reconsideration and for the first time argued that the immigration judge had no authority to make a frivolousness finding once the judge determined that the petition was time barred. The Board denied the motion on the merits, concluding in a written order that the judge had authority to issue the time-bar ruling *and* find the application frivolous. Ghazali seeks review of this last ruling (and only this last ruling) here.

II.

A word about jurisdiction is in order. The Immigration and Nationality Act strips federal courts of jurisdiction to review decisions "specified under [8

U.S.C. §§ 1151-1381] to be in the discretion of the Attorney General," except for asylum determinations. 8 U.S.C. § 1252(a)(2)(B)(ii). We previously have reviewed the Board's denial of a reconsideration motion without considering whether it is committed to the Attorney General's "discretion" and thus subject to the jurisdiction-stripping provision. *See, e.g.*, *Sanusi v. Gonzales*, 474 F.3d 341, 345 (6th Cir. 2007). Yet the Seventh Circuit recently held that the provision eliminates appellate jurisdiction over denials of motions to reopen, *see Kucana v. Mukasey*, 533 F.3d 534, 539 (7th Cir. 2008), and a concurring opinion suggested that this reasoning might extend to denials of motions to reconsider, *id.* at 539–40 (Ripple, J., concurring). The Supreme Court has granted review of *Kucana*. *See Kucana v. Holder*, 129 S. Ct. 2075 (2009) (No. 08-911). Even if we accept for the sake of argument (though not argued by either party) that § 1252 applies to motions for reconsideration, that would not preclude review here. Ghazali's petition raises a "question[] of law," a statutory exception to the jurisdiction-stripping provision, *see* 8 U.S.C. § 1252(a)(2)(D), *Kucana*, 533 F.3d at 538, one unlikely to be affected by the Court's decision in *Kucana*.

As for the merits, Ghazali's petition raises a new question: When an immigration judge determines that an asylum application is time barred, does that preclude the judge from also finding that the same application is frivolous? The Board answered no, and so do we.

Nothing in the statute says that an immigration judge may enter a frivolousness finding only when the application is timely filed or otherwise free of statutory bars. All it says is that an immigration judge may find

an application frivolous upon determining that an alien, on notice of the consequences of making a frivolous filing, "knowingly made a frivolous application for asylum." 8 U.S.C. § 1158(d)(6). The statute does not contain an inflexible order of battle—to the effect that immigration judges must address the statutory bars first and, once they do, may no longer make a frivolousness finding if a statutory bar applies. The statute, indeed, does not confine the judge's authority to make a frivolousness finding only to the merits of the application, as opposed to the procedural hurdles that an applicant must clear before the agency will consider his application. So far as the words of the statute are concerned, they permit the immigration judge to make a frivolousness finding about the merits of the asylum application (because the applicant, say, falsely claims that he has a well-founded fear of persecution in his home country) and about the timeliness of it (because the applicant, say, falsely claims that country conditions have changed, which would otherwise excuse the one-year filing requirement).

Nor is the time-bar provision akin to a restriction on subject matter jurisdiction that might require the immigration judge to address the procedural and substantive claims in a prescribed sequence. *Cf. Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93–94 (1998) (federal courts generally must address issues of subject matter jurisdiction before reaching the merits of a claim). In this case, for example, the immigration judge reached the merits of the asylum application in part as an alternative ground for decision. Ghazali points to nothing in the statute that prohibits the judge from doing just that—or for that matter from ruling on the merits rather than on a time-bar

question if the merits offer a more straightforward ground for decision. While federal judges generally may not assume away a difficult question of subject matter jurisdiction in order to reach an easy merits determination, *see id.*, the immigration statutes place no comparable constraint on an immigration judge.

The statute, it is true, says that time-barred applications "may be considered" if the alien shows changed circumstances, 8 U.S.C. § 1158(a)(2)(D), and that of course suggests, in the absence of the exception, that the time bar applies. But that is not the same as stripping the agency of jurisdiction to exercise its authority in a variety of ways: to issue alternative rulings, to reach the merits question first or to make a frivolousness finding with respect to a time-bar argument itself. *Cf. Arbaugh v. Y&H Corp.*, 546 U.S. 500, 516 (2006) (If Congress "clearly states that a threshold limitation on a statute's scope shall count as jurisdictional, then courts and litigants will be duly instructed . . . . But when Congress does not rank a statutory limitation . . . as jurisdictional, courts should treat the restriction as nonjurisdictional in character."). Indeed, to treat the time bar as jurisdictional here seems particularly odd given that the immigration judge plainly had jurisdiction to reach the merits of Ghazali's withholding-of-removal and CAT claims.

The implementing regulations also fail to place any such restriction on the immigration judge. They likewise say that "an applicant is subject to" a frivolousness determination upon a "specific[] find[ing] that the alien knowingly filed a frivolous asylum application." 8 C.F.R. § 1208.20. "[A]n asylum application," they add, "is frivolous if any of its

material elements is deliberately fabricated." *Id.* (emphasis added). So far as the regulations are concerned, an immigration judge may make this finding whenever an alien files a frivolous application, regardless of whether the judge ultimately denies the application on statutory-bar or substantive grounds. The judge simply needs to ensure that the finding relates to a "material" element of the application, *id.*, one that was material at the time the application was "made." 8 U.S.C. § 1158(d)(6). All of that was true here, and so also was it true that the judge met the other requirements of the regulations: He gave Ghazali notice of the consequences of making a frivolous application, gave him an opportunity to respond to the allegation of frivolousness and gave ample reasons for finding the application frivolous.

Principles of administrative deference re-enforce this conclusion. "It is well settled that . . . *Chevron* deference [applies] to" the Board's interpretations of the Immigration and Nationality Act, "as it gives ambiguous statutory terms concrete meaning through a process of case-by-case adjudication." *Negusie v. Holder*, ___ U.S. ___, 129 S. Ct. 1159, 1163–64 (2009) (internal citations omitted). Invoking the Attorney General's authority to provide "controlling" answers to "questions of law" arising under the Act, 8 U.S.C. § 1103(a)(1), the Board in this case expressly determined that an immigration judge could make a frivolousness finding with respect to a time-barred application. "[N]othing in the statutory or regulatory regime," it concluded, "divest[s] . . . authority to make a finding of frivolousness" on a statutorily barred application. J.A. 9. "[T]hat an asylum application is subject to a bar," it added, "does not mean that a deliberately fabricated element of the claim is not

'material' within the meaning of 8 C.F.R. § 1208.20 . . . .[,] particularly since the fabricated material element could also influence a grant of withholding of removal or protection under the Convention Against Torture." J.A. 9–10. The first explanation is entitled to *Chevron* deference, as it reflects the Board's reasonable construction of a statute that Congress empowered the agency authoritatively to construe. *Negusie*, 129 S. Ct. at 1163–64. The second explanation is entitled to near-conclusive *Seminole Rock* deference, as it reflects the Board's construction of its *own* regulations, namely the meaning of "material" elements of a claim. *See Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945) (agency interpretation of its own regulation receives "controlling weight unless it is plainly erroneous or inconsistent with the regulation").

Not only is the Board's position entitled to *Chevron* and *Seminole Rock* deference, but it also has the virtue of being consistent with a premise of related case law in our circuit. In the past, we have upheld frivolousness findings even after the petitioner offered to withdraw an application voluntarily. The absence of an application, we held, "did not obviate the need for the IJ to determine whether his false application should be deemed frivolous." *Lazar v. Gonzles*, 500 F.3d 469, 476 (6th Cir. 2007); *see also Shllaku v. Gonzales*, 139 F. App'x 700, 701 (6th Cir. 2005). If Ghazali is right, one of the premises of these cases must be wrong. For how are the deliberately fabricated elements of an application any less "material" in today's case than they are when the petitioner voluntari'y withdraws his application?

The Eleventh Circuit reads the statute and regulations the way we do. "[N]othing," it says, "divests an immigration judge of the authority to enter a ruling of frivolousness on an application for asylum that was found to be untimely." *Mingkid v. U.S. Att'y Gen.*, 468 F.3d 763, 768 (11th Cir. 2006). The Eighth Circuit likewise has affirmed a frivolousness finding on a time-barred application, though it did not comment on the issue. *Ignatova v. Gonzales*, 430 F.3d 1209, 1214 (8th Cir. 2005).

The Third Circuit sees it differently. *See Luciana v. Att'y Gen. of the U.S.*, 502 F.3d 273, 280 (3d Cir. 2007). "[W]hether 8 U.S.C. § 1158 provides authority to issue a frivolousness finding in the context of an untimely asylum application," it says, "is far from clear." *Id.* Noting that the regulations require the judge to determine that the alien "deliberately fabricated" a "material element[]" of his application, 8 C.F.R. § 1208.20, it reasons that any deliberate fabrications "going to the merits of the application" are not "material" because they cannot influence the disposition of an asylum application already barred by statute. 502 F.3d at 280–81.

We cannot embrace this position. The Third Circuit did not consider a dispositive ground for embracing the Board's decision—agency deference—and may not even have had a Board determination on the issue in front of it. (The parties' briefs in the case, for what it is worth, make no mention of the theory the Third Circuit embraced. *See* Brief for Petitioner, *Luciana*, 502 F.3d 273 (No. 05-3544), 2005 WL 6061570; Brief for Respondent, *Luciana*, 502 F.3d 273 (No. 05-3544), 2006 WL 5411457).) By contrast, in this case, the Board expressly rejected the Third Circuit's reasoning,

finding "nothing in the statutory or regulatory regime" that supports its position. J.A. 10. The Third Circuit's reasoning, as shown, also is in tension with a premise of related case law in our circuit. Ghazali offers no way to embrace the Third Circuit's position without forsaking a premise of *Lazar*, and we cannot think of one on our own.

The Third Circuit's reliance on the regulatory requirement that the falsity relate to a "material" aspect of the asylum application runs into another problem. If the Third Circuit is right that a frivolousness finding is no longer "material" once the immigration judge decides that it is time barred, the same would be true if the judge decided that the application failed on a distinct merits ground, whether related to the underlying frivolousness finding or not. For once that other ruling is a possibility, the same potential lack-of-materiality problem raises its head. But immigration judges frequently offer a host of merits-related grounds for rejecting an asylum application, and they should be permitted to do so without compromising their authority to make a frivolousness finding when appropriate.

In addition to the Third Circuit's decision in *Luciana*, Ghazali offers two other bases for reversing the Board, both unpersuasive. "[T]he time bar rule," he claims, "divest[s] the court from having jurisdiction to consider anything to do with an asylum claim" and thus prevents an immigration judge from proceeding to consider the frivolousness of the application. Ghazali Br. 12. The time-bar provision, it is true, does not disclaim the possibility that the statutory bars are jurisdictional. *See* 8 U.S.C. § 1158(a)(2)(B). But neither does it say they are. The immigration judge plainly

had jurisdiction over the merits of the asylum application at the time it was filed. And the reality that the judge identified a time bar did not prohibit it from reaching the frivolousness question any more than it would have prevented the judge from issuing an alternative merits ruling in the event his time-bar ruling was incorrect. *Cf. Arbaugh*, 546 U.S. at 516.

Ghazali adds that denying his application is penalty enough, and the frivolousness finding needlessly heaps on another penalty. But there is nothing gratuitous about this penalty. Why should Ghazali, who filed an untimely frivolous application, be treated better than an applicant who filed a timely frivolous application? Under Ghazali's theory, he would be free to file another application while the other applicant would not be, even though the only difference between them is that the second applicant *followed* the Act's timeliness requirements. If Ghazali is right, no good deed goes unpunished. If he is wrong, as we think he is, he gets his just deserts—at least relative to those who file timely, but fabricated, applications.

A final word. To say that immigration judges may make a frivolousness finding in the context of a time-barred application is not to say that they should. The finding has serious consequences for the applicant, and there is reason to worry that applicants (and their lawyers) may not defend themselves as well as they should in the context of an application that already is going nowhere.

III.

For these reasons, we deny the petition for review.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 08-4229

[Filed October 29, 2009]

ISSAM MOHAMAD GHAZALI,	)
Petitioner,	)
	)
v.	)
	)
ERIC H. HOLDER, JR.,	)
United States Attorney General,	)
Respondent.	)
	)

Before: DAUGHTREY, SUTTON and MCKEAGUE, Circuit Judges.

JUDGMENT

THIS MATTER came before the court upon a petition by Issam Mohamad Ghazali for review of a final order of the Board of Immigration Appeals.

UPON FULL REVIEW of the record and the briefs and arguments of counsel,

IT IS ORDERED that the petition for review is DENIED.

ENTERED BY ORDER OF THE COURT
/s/
Leonard Green
Clerk

APPENDIX B

[SEAL]

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

GHAZALI, ISSAM MOHAMAD
47420 PUTNEY COURT
CANTON, MI 48188-6266

Office of the District Counsel/DET
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207

Name: GHAZALI, ISSAM MOHAMAD

A095-457-939

Date of this notice: 8/29/2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr
Donna Carr
Chief Clerk

Enclosure

Panel Members:
PAULEY, ROGER

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A095 457 939 - Detroit, MI

Date: AUG 29 2008

In re: ISSAM MOHAMAD GHAZALI

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Pro se

APPLICATION: Reconsideration

ORDER:

PER CURIAM. This case was last before the Board on April 17, 2008, when we dismissed the respondent's appeal of an Immigration Judge's denial of his application for asylum and withholding of removal and request for protection under the Convention Against Torture. The respondent has now filed a timely motion in which he seeks reconsideration of our decision, arguing that the Immigration Judge–and, by extension, this Board–erroneously found that he had filed a frivolous request for asylum and was thus barred from that form of relief. The motion will be denied.

The respondent has failed to specify any particular errors of fact or law in our April 17, 2008, decision which would justify reversing our holding. *See* 8 C.F.R. § 1003.2(b)(1). The respondent first contends that we erred in affirming the Immigration Judge's frivolous finding based on an adverse credibility finding alone. *See Respondent's Motion* at 2-3. However, our affirmance of the Immigration Judge's frivolous finding was not based solely upon his adverse credibility determination, but instead was based upon the sufficiency of the frivolous finding under the standards articulated in our precedent decision in *Matter of Y-L*, 24 I&N Dec. 151 (BIA 2007), which requires more than just a determination that an alien also lacks credibility. *See also Lazar v. Gonzales*, 500 F.3d 469 (6th Cir. 2007) (citing to *Matter of Y-L-*, *supra*); *Ceraj v. Mukasey*, 511 F.3d 583 (6th Cir. 2007). Specifically, we agreed with the Immigration Judge's determination that two material elements of the respondent's asylum application had been deliberately fabricated: (1) his testimony that a gun battle had taken place at his home on August 11, 1986, and, (2) his claim that the first time he returned to Lebanon was in 1998, while his passport reflected return trips in 1992 and 1994. We find no error in either law or fact in our finding that the respondent deliberately fabricated elements of his asylum application.

The respondent also asks that we reconsider our decision based on *Luciana v. Attorney General of United States*, 502 F.3d 273, 281 (3d Cir. 2007), wherein the United States Court of Appeals for the Third Circuit found that a time-barred asylum application cannot also be a frivolous asylum application. We disagree with *Luciana*. The fact that an asylum application is subject to a bar does not

mean that a deliberately fabricated element of the claim is not "material" within the meaning of 8 C.F.R. § 1208.20. Under the Third Circuit's rationale, an alien ultimately found ineligible for asylum under any statutory or regulatory bar, such as a persecutor under section 208(b)(2)(A)(i) of the Immigration and Nationality Act, 8 U.S.C. § 1158(b)(2)(A)(i), or as convicted of an aggravated felony under section 208(b)(2)(B)(i) of the Act, could never be found to have submitted a frivolous application. We can find nothing in the statutory or regulatory schemes that would divest an immigration judge of the authority to make a finding of frivolousness on an asylum application that was also determined to be untimely or otherwise subject to a bar. *See* sections 240(a)(1) and (a)(3) of the Act, 8 U.S.C. §§ 1229a(a)(1), (3). Further, to allow such a prohibition could conceivably allow an alien to file an untimely application for asylum that contained deliberately fabricated material elements because there would be no penalties for doing so. *See Mingkid v. United States Attorney General*, 468 F.3d 763, 768 (11th Cir. 2006). Such a result could not have been what Congress intended when granting Immigration Judges the authority to make a determination if an asylum application is frivolous, particularly since the fabricated material element could also influence a grant of withholding of removal or protection under the Convention Against Torture. *See Mingkid, supra*.

In sum, the Immigration Judge correctly found the respondent had filed a frivolous asylum application, and we will not reconsider our decision of April 17, 2008. The motion is denied.

/s/
FOR THE BOARD

APPENDIX C

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR
IMMIGRATION REVIEW
UNITED STATES IMMIGRATION COURT
Detroit, Michigan

September 20, 2006

File No.: A 95 457 939

In the Matter of)
)
ISSAM MOHAMAD GHAZALI)
)
Respondent)

IN REMOVAL PROCEEDINGS

CHARGE: Section 237 (a) (1) (B) Immigration and Nationality Act, as amended - remained longer than time permitted.

APPLICATIONS: Asylum; withholding of removal; voluntary departure.

ON BEHALF OF RESPONDENT:
Bette Jean Lahti, Esquire

ON BEHALF OF DHS:
Michael B. Dobson, Associate Chief Counsel

ORAL DECISION AND ORDERS OF THE IMMIGRATION JUDGE

Background

The respondent is a male native and citizen of Lebanon. He was born on August 24, 1960. He was admitted to the United States at Chicago, Illinois, on or about July 21, 1999, as a nonimmigrant visitor. The Government has placed the respondent into removal proceedings. The Government has charged him with being removable, a course pursuant to the above-mentioned section of the Immigration and Nationality Act, hereinafter Act or INA.

The respondent, through counsel, admitted all of the factual allegations contained in his Notice to Appear. The Notice to Appear has been denominated as Exhibit No. 1. This Notice to Appear was served upon the respondent on October 7, 2003. Based upon respondent's concession through counsel to the four factual allegations, as well as based upon the contents of his post-referral asylum application, see Exhibit No. 2 and his testimony, the Court finds the respondent is removable by clear and convincing evidence. As he declined to designate a country of removal, Lebanon has been designated and directed pursuant to Section 241(b) of the INA, should such action become necessary.

On June 4, 2004, through present respondent's counsel, the respondent submitted an I-589. This submission was denominated as Exhibit No. 2. At that particular juncture, respondent through counsel conceded that the respondent was not eligible to apply for asylum, first because his application was not filed

within one year of his arrival in the United States. See INA Section 208, as well as 8 C.F.R. 1208.4. She also conceded that the respondent was firmly resettled in Switzerland in about 1989. Thus, he would not be eligible for asylum either. See INA Section 208, 8 C.F.R. 1208.13 and 1208.15.

This case was set for a merits hearing. The respondent appeared before this Court on September 15, 2006, for his scheduled hearing. The hearing did not take place at that particular time. The Court was informed that the respondent now wanted to bootstrap his application into an asylum application, given several factors. As the respondent's counsel was not able at that time to dictate the requisite changes to the application, located as Exhibit No. 2, as well as a problem with the respondent and recent oral surgery, the Court directed that the amendments to the application be given to the Court and to the Government by the following Monday, and then a hearing would commence the following Tuesday. That is today, September 20, 2006. At the commencement of the hearing on September 20, 2006, the respondent told the Court that he needed to make some minor scribner's changes to his application. Some scribner's changes basically were made, and the respondent indicated he had been over the application. The Court also noted that the respondent had been fully apprised orally and in writing on the previous merits hearing that was scheduled of the consequences of knowingly filing a frivolous application for asylum, and then the respondent signed his application without further ado. Therefore, respondent, through Exhibit No. 2 and its supplement, filed the day before the hearing, denominated as Exhibit No. 2A, is now seeking asylum pursuant to Section 208 of the Act, withholding

pursuant to Section 241(b) (3) of the Act, and, third and lastly, withholding pursuant to the United Nations Convention against Torture and other Forms of Cruel, Inhuman or Degrading Treatment or Punishment, hereinafter Torture Convention, pursuant to 8 C.F.R. 1208.16.

At a Master Calendar the respondent also indicated to the Court that he was going to be seeking in the alternative in lieu of an order of removal voluntary departure at the conclusion of the proceedings. Obviously, this application would have been under Section 240B(b) of the INA. The Court notes that during the course of the individual hearing the respondent was not asked one question with respect to his statutory eligibility. Furthermore, the Court notes, as will be developed below, the respondent has filed a frivolous application for asylum, and because he has filed a frivolous application for asylum the respondent could not be granted any discretionary relief by this Court, whether it be asylum or voluntary departure, as will be addressed below. Of course, that would not preclude absolutely the respondent being granted from withholding, but of course when the respondent has lied about two important matters obviously his story crumbles of its own weight, and as will be developed below he will not be entitled to withholding either. But in any event, because the respondent has filed a frivolous application for asylum his application for voluntary departure must be denied, even if he had laid the other factual statutory prerequisites, and he has not done so. So, this particular form of relief will be denied without further comment.

The Respondent's Claims

The respondent's claims for asylum as well as withholding under Section 241(b) (3) and withholding under the Torture Convention are identical. The Court will go into some detail about this application, and respondent's story and how it has changed over a period of time, when the Court addresses the respondent's testimony.

Succinctly stated, however, the respondent claims that he hails from south Lebanon, particularly a small village named Mashghara. Respondent indicated that he either had a perceived link or an actual link to the South Lebanese Army, sometimes called affectionately the SLA, as well as Israel. He then indicated that he and his family home, including his brother, was attacked by Hezbollah forces because of this perceived or actual link. This attack occurred on August 11, 1986. This caused the respondent and his brother to flee the home, going to a nearby Christian village. The village that the Court just named, respondent's home village where he was born, at that time was weighted approximately 50% Muslim and 50% Christian. In any event, after spending some time in this Christian village he fled on or went on to Beirut, ultimately going to Switzerland in the end of 1988, where he shortly thereafter obtained asylum. He then indicates that he returned to Lebanon in 1998. Again, there is some confusion about the dates of his return. He then found himself to be fearful. He returned because he thought things had improved, and things had not and so he came on to the United States, arriving on July 21, 1999.

The bottom line is respondent claims that he first fled Lebanon because he was on a hit list. He secondly fled Lebanon because he is on a hit list and he cannot go back because he is on a hit list and if he were to return to today's Lebanon he would be killed. Additionally, of course, what prompted the respondent to ultimately file the asylum application or to morph the 589 into asylum application was the recent war occurring this past summer between Hezbollah and Israel.

The Respondent's Asylum Application is Untimely

INA section 208 (a) (2) requires that the respondent apply for asylum within one year of alien's last arrival in the United States. Now, in the case, of course, it is unrebutted that the respondent did not apply for asylum within one year of his last arrival in the United States. The respondent is trying to bootstrap his claim into a timely application by claiming, of course, this changed circumstance, the ongoing, or at one time ongoing, conflict between Hezbollah and Israel, which has since ceased, of course, at least the hot war. Now, of course, the respondent's testimony was that he came to the United States because his name was on a hit list, and even though he went back to Lebanon because he thought things were different things, it turned out, really were not different, even though he stayed there a while and nothing bad happened to him, of course. That is why he came on to the United States, because of this hit list. Respondent testified he did not file for asylum first because he thought things were going to improve, and then, of course, he later became a groom and then had several progeny born in the United States. Now, the bottom line, of course, is that the respondent fled Lebanon, if

you believe his story, and as the Court will develop the Court will show that his story is not believable, but if you believe the respondent's story he fled for his life and therefore feeling that the things might improve, and therefore in electing not to apply for asylum, is not an exception under the statute or the regulation. If it was an exception, then you might as well read out of the statute and the regulation found at 8 C.F.R. 1208.4 the timeliness requirement.

The Court also notes, of course, that respondent actually returned to Lebanon on two prior occasions, which is one of the reasons which causes the respondent's application to being found frivolous, in any event.

Now, the Court also notes that one might argue that the Court should not find the respondent's application for asylum frivolous if he has not filed a timely application, nor if his application is barred for any other reason, such as firm resettlement. Of course, this argument crumbles under its own weight in the Court's view, because the frivolousness of the application and the consequences that flow from that are designed to do two things. They are designed to, first, be a general deterrent to everyone so that they do not file frivolous applications for asylum. Secondly, in the case at bar, it is also to act as a deterrent in an individual case. Just because one ultimately does not have a viable asylum application, of course, is no reason to forgive the frivolous requirements as otherwise we would get all sorts of frivolous applications that were otherwise untimely. So, public policy dictates that even under the scenario in the case that the respondent's application can be found frivolous.

The Respondent's Application Is Barred Because of Firm Resettlement

As described above, respondent after he had this alleged incident on August 11 ultimately fled to Switzerland, where he was, by his own words, granted asylum. He lived a normal life in Switzerland. He was able to own a lucrative business. He was able to own his own home. He was able to travel freely throughout Switzerland. He was able to travel freely throughout the entire world with one exception, and that was he could not go back to Lebanon, of course, that is for obvious reasons, and that if he went back to Lebanon he would lose his asylum status. Well, the respondent initially in his testimony indicated that he never returned to Lebanon and that he only returned when he thought through his father that things had improved, and he returned in the late 1990s. Of course, we later learned that this was an absolute lie, when his passport was shown to him, which is Exhibit No. 8, and he had to concede, of course, that he was able to travel to Lebanon on two other occasions for short stays in the mid-1990s. In any event, of course, because the respondent was not fleeing Lebanon out of fear, because the Court finds that his story is fake, phony and fraudulent, the respondent's previous grant of asylum after the alleged August 11 incident precludes the respondent from applying for asylum because he has been firmly resettled in Switzerland and there basically is no change in his condition. Accordingly, the respondent is precluded from applying far asylum. See INA Section 208, 8 C.F.R. 1208.13, and 8 C.F.R. 1208.15.

Asylum and Withholding of Removal Evidentiary Standards

Now, while the Court has found the respondent ineligible to apply for asylum, both because of the one year bar and the firm resettlement, the Court will assume *arguendo* for the rest of this decision that the respondent has no bars at this juncture, and the Court will also address the merits of his application and his application will be denied on its merits.

An applicant for asylum or withholding under the statute bears the evidentiary burdens of both proof and persuasion. Matter of Acosta, 19 I&N Dec. 211 (BIA 1985), modified; Matter of Mogharrabi, 19 IW Dec. 439 (BIA 1987).

An applicant for asylum must demonstrate that he is a refugee within the meaning of Section 101(a) (42) of the INA. This requires him to show that he is unwilling or unable to return to his country of nationality, of course here Lebanon, because of past persecution coupled with either a showing of the likelihood of present or future persecution or for humanitarian reasons as a matter of discretion, or because he has a well-founded fear of future persecution on account of his race, religion, nationality, membership in a particular social group, or political opinion. Matter of Mogharrabi, supra; see also 8 C.F.R. 1208.13.

On the other hand, an applicant for withholding under the statute must demonstrate a clear probability of persecution on account of the statutorily stated grounds. INS v. Stevic, 467 U.S. 407 (1984). In Stevic, the Court held that the clear probability standard

requires a showing it is more likely than not he would be subject to persecution. See also 8 C.F.R. 1208.16.

In INS v. Cardoza-Fonseca, 480 U.S. 421 (1987), the Supreme Court made it clear that the terms well-founded fear and clear probability are significantly different and that the burden of proof required to establish eligibility for asylum is lower than that required for withholding of removal.

The Court parenthetically observes again that the firm resettlement and the one year bar only apply to asylum and not to withholding under either the statute or the Torture Convention.

With respect to the Torture Convention, the respondent has the burden of demonstrating it is more likely than not he would be tortured for any reason upon his return to Lebanon. In assessing whether the applicant has sustained his burden, the Court must consider all evidence relevant to the possibility of future torture, including but not limited to evidence of past torture inflicted, evidence of gross, flagrant or mass violations of human rights within the country of removal and other relevant information about conditions in Lebanon. See, generally, 8 C.F.R. 1208.16 (c) (2) and (3).

The Court is not going to further define torture because the respondent is an inherently incredible person and he cannot possibly sustain his burden of proof for any relief, let alone the Torture Convention relief.

Evidence Discussion and Findings

The Court is now going to embark upon a succinct discussion of the evidence.

The Court will note initially that the Court is not going to address the numerous documents talking about current and past country conditions in Lebanon. The Court is going to do this for one very basic reason. The respondent is a demonstrable and proven liar. He has not demonstrated he has ever even met anybody that might be affiliated with Hezbollah. He has not demonstrated he has ever had any connection one way or the other with the SLA. He has not demonstrated any nexus between him and Israel. So, it would be superfluous to talk about these country reports.

Respondent commenced his testimony by saying he had applied for asylum in Switzerland and he was granted it. He said in 1986 he was "put on a hit list". Apparently, this is a list in someone's brain. In any event, he then indicated that something happened to him and his brother on the August 11 date. They tried to shoot us and we fled then to a Christian village named Aintenit. Of course, this village can be spelled other ways, as we are talking about Arabic names and this is basically a phonetic spelling. He said he stayed six months or thereabouts in this Christian village, went on to Beirut and then ultimately left to go to Switzerland late in 1988. He also indicated his brother left to go to Canada and became a citizen of Canada. His brother's name is Rabih. Now, the brother actually was the second witness to testify, and it became known that the witness' last name is spelled slightly different than the respondent, as the last name now ends in E

as opposed to I. Again, this is partially due to Arabic being phonetically spelled into the English script.

Respondent then said that he returned to Switzerland, and he stayed in Switzerland until he returned to Lebanon in 1998, because he thought the situation was better. He also noted that by returning to Lebanon in 1998, after this long hiatus, he lost his asylum upon returning.

He then said that he came to the United States in 1999 on a visitor's visa because most if not all of his family was here. He then ultimately married and then had three progeny, and his wife is currently pregnant. He has established a very lucrative ongoing business, a number of gas stations.

He says things are still tough and he cannot return to Lebanon.

He then said that he left his home village on August 11, 1986. He described Hezbollah coming to the house between 12:00 and 1:00. At first the Court thought, because his application, see Exhibit No. 2, said it was the evening, that this was actually midnight. Well, as it develops in his testimony it was, no, noontime, lunchtime, when he was eating. Of course, his application says evening and his brother testified it was evening. This begins the downfall of respondent's credibility. In any event, he indicated that he belonged to a group, and ultimately he testified that he was the sole survivor of this group, which cannot be actually true because apparently his brother was part of this group, and the bottom line of this group was that they had some either perceived affiliation with Israel and the South Lebanese Army,

an army he even characterizes as being an ally and run by the Israelis, or they had an actual relationship to it. That will be developed more in just a moment. Ultimately, he indicated that there was a shootout after Hezbollah basically forced their way into the home. They exchanged gunfire for two hours, or thereabouts, and then they fled the home and transversed over night over two mountains into this Christian village. Of course, the brother, who was called to corroborate this story, indicated that this did not happen at noontime, it happened in the evening, about suppertime, and there was no gun battle. In fact, they were not even armed, and once they heard the noise of the Hezbollah out of the home were warned by the sister who was present then they fled immediately. So, there was no hiatus of two hours. In fact, they did not even take time to pack a suitcase they left so fast. Of course, the respondent testified that present in the home at that time were his mother, a sister and a female cousin, and that was it. Of course, the brother testified that those three people, yes, were there, but granny was there too. Again, this demonstrates in the Court's view that this incident absolutely did not happen. The respondent made this up out of nothing. This will be verified when, of course, we talk about the respondent's testimony that he never returned to Lebanon until 1998, which he had to confess was a lie when he was shown Exhibit 8, his passport.

He then said, of course, that he was considered a spy or an enemy of the Hezbollah. That is why he is currently at risk, and why he has been at risk in the past.

He testified further that if he returns to Lebanon he thinks he is still on this list. I am the only one that

got away, he said, whatever that means, as his brother is sitting here in the courtroom and testified, and I do not think I have ever been forgiven.

He was asked on cross-examination if he had any evidence of this August 11 incident. He said well, it was reported in the press, I am sure I can probably get some press articles but I did not think it was important to corroborate my claim, or words to that effect. Again, of course, he claims he could do it. He did not. This is another indicia this has been made up out of nothing. Even if there was a similar incident in his village, where a number of other people were killed, simultaneously or shortly before the incident, vis a vis the respondent and his brother, this of course does not prove that anything happened vis a vis the respondent or his brother.

Why did you come to the United States, well I wanted to escape, I was afraid of my life. I am still on the list, it is not safe even in Beirut. Of course, the respondent, when he went back in 1998 lived in Beirut for approximately one year. As it turned out, he actually visited Beirut in 1992 and 1994 and had no difficulty, so I query why he now thinks that he would have any trouble. Furthermore, of course, even if you believe the respondent's story between August 11 and when he left for Switzerland he had no difficulties, and much of that time he spent in Beirut too. So, his own testimony demonstrates even if he is telling the truth he should not fear anything in Beirut and has not had any harm come to him in Beirut. In fact, even though at one time he said he was in hiding it turns out he actually owned a Ford dealership in Lebanon and he belongs to one of the most wealthy families in the country. He is hardly describing being in hiding.

He then talked about, of course, going to Switzerland. He owned a business. He owned a house. He could travel anywhere in the world other than Lebanon.

He then also mentioned that he was a member of the SLA, even though his own lawyer indicated no, he was not, and even though there is no mention of him being an SLA member in his application, neither at Exhibit 2 or Exhibit 2A. Of course, on cross-examination he was asked why did not you put in there that you were a member of the SLA. Well, I did not want to unnecessarily drag out my story, or words to that effect, which, of course, makes absolutely no sense and is another indicia that the respondent just cannot tell a straight story. Furthermore, he testified that his brother, who would be the next witness, had no idea that he, that is the respondent, was a member of the SLA.

He was asked on cross-examination if anything bad happened to him while he was in Lebanon after giving up his asylee status in Switzerland. He said no, nothing happened bad. This is when he told us about selling Fords as well as Mitsubishi cars within Beirut.

He was then asked very bluntly whether he had been back to Lebanon any time between going to Switzerland and returning in 1998, and he said no. He was asked are you sure. He said in essence I am positive. The Government then proffered Exhibit 8 for identification, a document that was ultimately received as Exhibit 8, his passport, and quite clearly it reflects in 1992 he was in Lebanon and in 1994 he was in Lebanon. When he was asked why he lied he basically had no answer. Ultimately, he said well, I

was smuggled into the country or I came through parts where there is no Hezbollah. Ultimately, he had to confess that not only was his testimony a lie but that he stayed 11 days in 1992 and approximately two weeks in 1994. Keep in mind, of course, his direct examination was prefaced by the fact that I could not possibly go back to Lebanon because I was on this hit list and I only went back in 1998 after my father sort of suggested that things had improved. I got back there in 1998 and found that they had not. So, the fact that he claimed that he did not go back in the interim is a very material aspect of his asylum claim, and, of course, the fact that he then made up out of nothing this August 11 incident, which goes to the heart of his asylum application, is also material to his claim.

Lastly, his brother testified. His brother talked about the August 11, 1986, incident. He began by telling us we were in our family home. Our main residence was in Beirut. We only had a residence here in the village where we came to celebrate a holiday, or some such. He then indicated that there was a rough time. We had no way to defend ourselves. The Court was not certain what he meant by the exact language he used, because he did not use exactly those terms. This is when he clarified that he meant they had no way to protect themselves. Ultimately, the brother verified that they did not have any weapons. The brother also verified, of course, that there was no shootout for two hours. The brother also testified that we left immediately and the incident had happened with the granny in the house, as well as they left immediately and that it happened between 5:00 and 6:00 in the evening.

This brother's testimony demonstrates quite vividly that this whole August 11 incident is made up out of nothing.

The bottom line is is that the respondent is not credible. He has testified inconsistently within his own testimony. He has testified inconsistently with his application. He has testified inconsistently with his corroborative witness, and the bottom line is that the respondent has not shown any affiliation or relationship with the SLA, Israel and the Hezbollah. Again, because of this the Court has no reason to peruse and examine for its decision the Country Reports located in the record. The Court also notes that the Court has found that not only has respondent lied but he has made up this August 11 incident, and that is why the application is going to be found frivolous. He has also lied about not returning to Lebanon. The Court notes that not only did he testify that he had not returned but his own application for asylum, as it turns out, actually indicated in some handwriting that was added after the first application, that is Exhibit No. 2, was typed, that he had returned on at least more than one occasion but did not know the time or the dates. So, even his application is inconsistent with his direct examination, which just shows that he has no excuse to lie to the Court, and obviously his testimony that he never returned but this one time is absolutely false.

Now, the Court notes that the Court has mentioned on several occasions that the respondent cannot sustain its burden and that the respondent is totally unbelievable and therefore he cannot be granted asylum or either withholdings.

With respect to the frivolousness, the Attorney General, pursuant to the powers delegated to him by Congress, has codified a regulation at 8 C.F.R. 1208.20 which indicates what has to happen before this Court or the Board of Immigration Appeals can find the respondent's application for asylum to be frivolous. Again, this is 8 C.F.R. 1208.20. It provides for applications filed after the first day of April 1997, as in the case at bar. An applicant is subject to the frivolous provisions of Section 208(d) (6) of the INA if a final order of the judge or the Board of Immigration Appeals specifically finds that the alien knowingly filed a frivolous application for asylum. The Attorney General further says that for the purposes of this section an asylum application is frivolous if any material element is deliberately fabricated. Of course, there were two material elements that were deliberately fabricated. Then it notes that the findings shall be made by the judge or the Board only if the entity is satisfied that the applicant during the course of the proceedings has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim. He certainly had the opportunity to do that. In fact, when he was asked why he lied to the Court he had no response.

Now, for the purpose of this section, obviously, a finding that the alien filed a frivolous application shall bar all applications for relief except withholding. Again, however, because of the respondent's blatant lies about material aspects his own credibility has completely evaporated, or sunk like a rock in a river, take your pick. But, the bottom line is he cannot establish that he should be entitled to withholding of removal, and accordingly that application will be denied as well.

Orders

For the reasons stated above, the Court issues the following orders.

IT IS HEREBY ORDERED that the respondent's application for asylum, withholding under the statute, and withholding under the treaty be denied.

IT IS FURTHER ORDERED that the respondent's application for voluntary departure be denied, and he be removed from the United States to Lebanon on the charge found in this Notice to Appear.

ROBERT D. NEWBERRY
Immigration Judge

APPENDIX D

[SEAL]

U.S. Department of Justice

Executive Office for Immigration Review

Board of Immigration Appeals
Office of the Clerk

5107 Leesburg Pike, Suite 2000
Falls Church, Virginia 22041

Lahti, Bette Jean, Esquire
199 West Brown Street, Suite 210
Birmingham, MI 48009-0000

Office of the District Counsel/DET
333 Mt. Elliott St., Rm. 204
Detroit, MI 48207

Name: GHAZALI, ISSAM MOHAMAD

A95-457-939

Date of this notice: 4/17/2008

Enclosed is a copy of the Board's decision and order in the above-referenced case.

Sincerely,

/s/ Donna Carr
Donna Carr
Chief Clerk

Enclosure

Panel Members:
PAULEY, ROGER

U.S. Department of Justice
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of Immigration Appeals

File: A95 457 939 - Detroit, MI

Date: APR 17 2008

In re: ISSAM MOHAMAD GHAZALI

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Bette Jean Lahti, Esquire

ON BEHALF OF DHS: Michael B. Dobson
Assistant Chief Counsel

CHARGE:

Notice: Sec. 237(a)(1)(B), I&N Act [8 U.S.C. § 1227 (a)(1)(B)] - In the United States in violation of law

APPLICATION: Asylum; withholding of removal; Convention Against Torture

The respondent's appeal of the Immigration Judge's September 20, 2006, decision denying his applications for asylum, withholding of removal, voluntary

departure, and protection under the Convention Against Torture ("CAT"), is dismissed.[1]

We note first that the record supports the Immigration Judge's determination that the respondent is ineligible for asylum due to the 1-year filing deadline. *See* section 208(a)(2)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a)(2)(B); *see also* 8 C.F.R. § 1208.4(a)(2) (2007). We agree with the Immigration Judge's decision that the respondent does not merit an exception to the 1-year bar for the reasons stated therein (I.J. at 6-8). *See* section 208(a)(2)(D) of the Act, 8 U.S.C. § 1158(a)(2)(D); 8 C.F.R. §§ 1208.4(a)(4), (5). While the respondent appears to contend that the changed circumstances in his case are the more recent escalation of problems in Lebanon involving Hezbollah, we would find these events part of a continuation of the original basis for his claim of relief, that of being put on a hit list by Hezbollah in 1986 (Tr. at 50).

We also affirm the Immigration Judge's denial of the respondent's request for asylum based on a finding that the respondent was firmly resettled in Switzerland before arriving in the United States (I.J. at 8-9). According to section 208(b)(2)(A)(vi) of the Act, 8 U.S.C. § 1158(b)(2)(A)(vi), an alien is barred from asylum if he was firmly resettled in another country prior to arriving in the United States. Here, the respondent testified that he was granted asylum in Switzerland in 1989, where he opened a business,

---

[1] The respondent did not set forth any claim under the Convention Against Torture, and, on appeal, he makes no arguments regarding the denial of CAT relief or voluntary departure.

owned a home, and was allowed to travel freely in Switzerland (Tr. at 63, 86-88, 119-120). We further note that the respondent offered no testimony that any restrictions were imposed by his Switzerland refugee status, (Tr. at 88) and the reason for losing his status was simply that he returned to Lebanon. In addition, the respondent has failed to articulate any appellate argument regarding the finding of firm resettlement on appeal.

Moreover, we find that the Immigration Judge's denial of the respondent's application for asylum and withholding of removal under the Act based upon his adverse credibility determination predicated upon inconsistencies and omissions between the respondent's testimony, written application, testimony of a witness, and documentary evidence is supported by the record (I.J. at 11-19). The inconsistencies and omissions cited by the Immigration Judge are present in the record and provide specific and cogent reasons upon which to base an adverse credibility determination. *See Duan Ying Chen v. Gonzales*, 447 F.3d 468, 472 (6th Cir. 2006), *citing Sylla v. INS*, 388 F.3d 924, 925-26 (6th Cir. 2004); *see also Shkabari v. Gonzales*, 427 F.3d 324, 329 (6th Cir. 2005). The respondent testified that, because of his involvement with the South Lebanon Army (SLA), the Hezbollah militia attacked his family home at noon on August 11, 1996 (Tr. at 53-54, 91). The respondent further testified that a gun battle ensued between the militia and the persons in his home, which lasted approximately 2 hours (Tr. at 97-101). As noted by the Immigration Judge, contradicting this testimony was the respondent's application for asylum and testimony offered by the respondent's brother indicating that the attack by Hezbollah occurred in the early evening, not

at noon (Tr. at 142-143; Exh. 2). Most notable, however, was the inconsistency between the respondent's testimony that there was a gun battle between Hezbollah and the persons in his home, and his brother's testimony that his family was not armed (Tr. at 136, 148). This significant detail was also missing from the respondent's (Exh. 2). The Immigration Judge also noted a significant discrepancy between the respondent's testimony and documentary evidence. The respondent testified that after receiving asylum in Switzerland in 1989, he did not return again to Lebanon until 1998 (Tr. at 108). However, this statement was contradicted by the respondent's passport, which reflected entries into Lebanon in 1992 and 1994 (Exh. 8). The respondent's only explanation for his false testimony was that he was hiding the fact that he was smuggled into Lebanon (Tr. at 109-117).

Based on the foregoing, we find no reason to disturb the Immigration Judge's denial of the respondent's application for asylum and withholding of removal under the Act based upon his adverse credibility determination. *See Liti v. Gonzales*, 411 F.3d 631, 637 (6th Cir. 2005) (omissions from an asylum application may support an adverse credibility determination as long as they are "substantially" related to the asylum claim); *see also Vasha v. Gonzales*, 410 F.3d 863, 871 n.4 (6th Cir. 2005), *citing Secaida-Rosales v. INS*, 331 F.3d 297, 308 (6th Cir. 2003). Further, like the Immigration Judge, we find the respondent's explanations for these omissions and discrepancies insufficient. *See N'Diom v. Gonzales*, 442 F.3d 494, 499 (6th Cir. 2006).

Additionally, we share the Immigration Judge's concerns regarding the overall veracity of the respondent's claim, and affirm the Immigration Judge's finding that the respondent filed a frivolous request for asylum in the United States. *See* section 208(d)(6) of the Act, 8 U.S.C. § 1158(d)(6); 8 C.F.R. § 1208.20. A finding of frivolousness is warranted where any material elements of an asylum claim are deliberately fabricated, although such a finding does not automatically flow from an adverse credibility determination. *See Matter of Y-L-*, 24 I&N Dec. 151, 156 (BIA 2007). In the present case, the Immigration Judge expressly stated that the respondent deliberately fabricated his testimony in two respects: (1) the respondent's testimony on cross-examination that a gun battle took place at his home on August 11, 1986, which was contradicted by his brother's testimony and not included in his asylum application (I.J. at 15-16; Tr. at 56, 58, 68-69, 83, 85; Exh. 3A); and, (2) the respondent's testimony that the only time he returned to Lebanon was in 1998, which was contradicted by his passport which reflected his return to Lebanon in 1992 and 1994 (Tr. at 108; Exh. 8). Upon review of the record, we find the frivolous finding meets the requirements set forth in *Matter of Y-L-*, *supra*. The respondent was given notice repeatedly of the consequences of filing a frivolous application, the Immigration Judge's decision contains specific findings related to the frivolous finding, the evidence in the record supports the findings regarding the material elements of the asylum application which were fabricated, and the respondent was given a sufficient opportunity to explain these material discrepancies (Tr. at 33-34, 39, 97-101, 108-113, 117-118, 120-122, 136-138). We further note that the Immigration Judge expressed his concerns with the frivolous nature of the

respondent's application during proceedings, and the Department of Homeland Security also raised the issue of frivolousness during the course of the hearing (Tr. at 113, 157-158); *Matter of Y-L, supra*, at 160. Under these circumstances, we conclude that these discrepancies support a finding of frivolousness in this case. *Id.*

We have considered the respondent's contention that his due process rights were violated because the introduction of his passport into evidence violated Sixth Circuit evidentiary rules. In administrative proceedings, however, the Federal Rules of Evidence are not controlling. *See Matter of Grijalva*, 19 I&N Dec. 713 (BIA 1988); *see also Matter of Velasquez*, 19 I&N Dec. 377 (BIA 1986). An Immigration Judge may receive into evidence any oral or written statement which is material and relevant to any issue in the case made by the alien or any other person during any investigation or examination. We follow the rule that when evidence is shown to be probative and fundamentally fair, such as here, where it was the respondent's own passport that was introduced into evidence, a hearsay challenge to its admissibility will not be countenanced. *Matter of Escobar*, 18 I&N Dec. 412 (BIA 1983); *Matter of Exilus*, 18 I&N Dec. 276 (BIA 1982).

Finally, we note the respondent's argument in his Notice of Appeal (EOIR Form-26) that the Immigration Judge erred in not granting him a longer continuance to recover from oral surgery and, as the beneficiary of an 1-130 visa petition filed on his behalf, to await the outcome of his spouse's appeal of the denial of her N-400 application. The record reflects that at the September 15, 2006, hearing the Immigration Judge

granted the respondent's motion for a continuance to recover from dental surgery, and that respondent's counsel agreed to rescheduling the merits hearing date to September 20, 2006 (Tr. at 12-13). In addition, at the September 20, 2006, merits hearing, the respondent stated, in reply to questioning by the Immigration Judge, that he had recovered from his surgery by "99 percent," and that he was no longer on medication (Tr. at 45-46). Given the Immigration Judge's prior grant of a continuance to afford the respondent additional time to recover from his oral surgery, the respondent's assurance to the court that he was recovered and no longer on medication, and the entirely speculative nature of his ability to adjust in the future on the basis of a visa petition, we do not find any prejudicial error in the Immigration Judge's denial of the request for a further continuance. *Matter of Sibrun*, 18 I&N Dec. 354, 356 (BIA 1983) ("an Immigration Judge's decision denying [a] motion for continuance will not be reversed unless the alien establishes that [the] denial caused him actual prejudice and harm and materially affected the outcome of his case").

Based on the foregoing, we find no reversible error in the Immigration Judge's conclusion that the respondent has failed to establish eligibility for relief. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

/s/
FOR THE BOARD

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Case No. 08-4229

[Issued November 25, 2009]

ISSAM MOHAMAD GHAZALI,	)
	)
Petitioner	)
	)
v.	)
	)
ERIC H. HOLDER, JR., Attorney General,	)
	)
Respondent	)

ORDER

BEFORE: DAUGHTREY, Circuit Judge; SUTTON, Circuit Judge; MCKEAGUE, Circuit Judge;

Upon consideration of motion to stay mandate,

It is **ORDERED** that the mandate be stayed to allow petitioner time to file a petition for a writ of certiorari, and thereafter until the Supreme Court disposes of the case, but shall promptly issue if the

petition is not filed within ninety days from the date of final judgment by this court.

ENTERED BY ORDER OF THE COURT
Leonard Green, Clerk

/s/ Leonard Green

Issued: November 25, 2009

No. 09-912

In the Supreme Court of the United States

ISSAM MOHAMAD GHAZALI

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
TONY WEST
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
Attorneys
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Board of Immigration Appeals reasonably interpreted 8 C.F.R. 1208.20 to mean that deliberate fabrications in an asylum application can be "material," and thus the basis for a frivolousness finding, even when the application is not timely filed.

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In the Supreme Court of the United States

No. 09-912

ISSAM MOHAMAD GHAZALI

v.

ERIC H. HOLDER, JR., ATTORNEY GENERAL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 585 F.3d 289. The decisions of the Board of Immigration Appeals (Pet. App. 16a-18a, 40a-46a) and the immigration judge (Pet. App. 19a-37a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a) was entered on October 29, 2009. The petition for a writ of certiorari was filed on January 25, 2010. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Immigration and Nationality Act (INA), 8 U.S.C. 1101 *et seq.*, provides that the Secretary of Homeland Security or the Attorney General may, in her

or his discretion, grant asylum to an alien who demonstrates that he is a "refugee." 8 U.S.C. 1158(b)(1)(A). An alien who wishes to be granted asylum must file his application within one year of arriving in the United States, 8 U.S.C. 1158(a)(2)(B), unless he can establish "changed circumstances which materially affect the applicant's eligibility for asylum" or exceptional circumstances excusing his delay in filing. 8 U.S.C. 1158(a)(2)(D).[1]

An applicant for asylum bears the burden of demonstrating that he is eligible for that form of relief. 8 U.S.C. 1158(b)(1)(B)(i). If the applicant does not carry that burden and if the immigration judge (IJ) determines that the alien knowingly filed a "frivolous" asylum application, the alien "shall be permanently ineligible" for any discretionary form of relief under the INA. 8 U.S.C. 1158(d)(6); cf. 8 C.F.R. 1208.20 (bar does not apply to withholding of removal). The relevant regulation provides in relevant part that "an asylum application is frivolous if any of its material elements is deliberately fabricated." *Ibid.*; see *ibid.* ("Such finding shall only be made if the immigration judge or the [Board of Immigration Appeals (BIA)] is satisfied that the applicant, during the course of the proceedings, has had sufficient opportunity to account for any discrepancies or implausible aspects of the claim.").

2. Petitioner is a native and citizen of Lebanon. See Pet. App. 20a. He entered the United States in 1999 on

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[1] An applicant who is ineligible for asylum because of an untimely filed application remains eligible for withholding of removal, see 8 U.S.C. 1231(b)(3)(A), and protection under the Convention Against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, *adopted* Dec. 10, 1984, S. Treaty Doc. No. 20, 100th Cong., 2d Sess. (1988), 1465 U.N.T.S. 85. See 8 C.F.R. 1208.13(c)(1), 1208.16(c).

a non-immigrant visa that entitled him to stay only until 2001. *Id.* at 2a. He remained past that date, and the Department of Homeland Security initiated removal proceedings against him by issuing a Notice to Appear in October 2003. *Id.* at 20a. Petitioner subsequently filed an application for asylum. *Ibid.*

On September 20, 2006, following a hearing on petitioner's asylum application, an IJ denied his application on three alternative grounds. Pet. App. 24a-27a. First, the IJ found that the application was untimely because it was filed more than a year after petitioner's arrival in the United States and that petitioner had not demonstrated changed circumstances in Lebanon that would justify his late filing. *Id.* at 24a-25a. Second, the IJ found that the application was barred because petitioner had previously been granted asylum in Switzerland and had been "firmly resettled" there. *Id.* at 26a. Third, the IJ denied the application on the merits, finding that petitioner had not carried his burden of establishing that he was a refugee for purposes of the INA. See *id.* at 27a.

The IJ also found that petitioner had made deliberate falsehoods to the court and that his application was thus frivolous. See Pet. App. 27a-36a. The IJ based this finding on two material misrepresentations. First, petitioner testified that he was forced to leave his town in Lebanon after members of Hezbollah, who he said targeted him because of his perceived affiliation with Israel and a group called the South Lebanese Army, came to his house and engaged in a two-hour gun battle with petitioner and his family members. *Id.* at 30a-31a. Petitioner's brother testified and gave a different account of this incident; for example, the brother testified that there was no gun battle. *Id.* at 34a-35a. The contradic-

tions led the IJ to conclude that "this incident absolutely did not happen" and that petitioner "made [it] up out of nothing." *Id.* at 31a.

Second, petitioner testified that he had not returned to Lebanon between his departure in 1988 and 1998 (when he returned for approximately a year) because of his fear of persecution by Hezbollah. Pet App. 29a, 32a, 34a. His passport, however, indicated that he had returned in 1992 and in 1994. *Id.* at 33a. When confronted with his passport, petitioner acknowledged the visits and admitted that his prior testimony had been false. *Id.* at 34a.

On April 17, 2008, the BIA dismissed petitioner's appeal, agreeing with all three bases for the IJ's decision, as well as the IJ's frivolousness finding. Pet. App. 40a-45a. On August 29, 2009, the Board denied petitioner's motion to reconsider its affirmance of the IJ's finding that he filed a frivolous asylum application. *Id.* at 16a. As an initial matter, the BIA found no error in its previous determination that petitioner "deliberately fabricated elements of his asylum application." *Id.* at 17a.

The BIA also declined petitioner's request that it reconsider its decision in light of *Luciana* v. *Attorney General of the United States*, 502 F.3d 273 (3d Cir. 2007), which held that the BIA's regulations did not permit a frivolousness finding for an untimely asylum application. Pet. App. 17a. The BIA said it "disagree[d]" with *Luciana*; it could "find nothing in the statutory or regulatory schemes that would divest an [IJ] of the authority to make a finding of frivolousness on an asylum application that was also determined to be untimely or otherwise subject to a bar." *Id.* at 18a (citing 8 U.S.C. 1229a(a)(1) and (3); 8 C.F.R. 1208.20). In addition, the

BIA noted that such a rule "could conceivably allow an alien to file an untimely application for asylum that contained deliberately fabricated material elements because there would be no penalties for doing so." *Ibid.* (citing *Mingkid* v. *United States Att'y Gen.*, 468 F.3d 763, 768 (11th Cir. 2006)). The BIA found no indication that Congress would have intended such a result, "particularly since the fabricated material element could also influence a grant of withholding of removal or protection under the Convention Against Torture." *Ibid.*

3. Petitioner filed a petition for review with the court of appeals. On October 29, 2009, the court of appeals denied the petition for review. Pet. App. 1a-12a. The court determined that the IJ's finding that the asylum application was time-barred did not preclude the IJ from also finding that the asylum application was frivolous. *Id.* at 5a. The court agreed with the BIA that "[n]othing in the statute says that an [IJ] may enter a frivolousness finding only when the application is timely filed or otherwise free of statutory bars." *Id.* at 5a-6a (citing 8 U.S.C. 1158(d)(6)).

The court of appeals explained that the prohibition on untimely asylum applications was not "akin to a restriction on subject matter jurisdiction that might require the [IJ] to address the procedural and substantive claims in a prescribed sequence." Pet. App. 6a. An IJ was therefore free to deny an application on the merits without reaching the question of timeliness or, as in this case, to deny on alternative grounds. *Id.* at 6a-7a. The court of appeals likewise read the applicable regulation to authorize the IJ to make a frivolousness finding "regardless of whether the judge ultimately denies the application on statutory-bar or substantive grounds." *Id.* at 8a. The court noted that its conclusions were sup-

ported by "[p]rinciples of administrative deference," since they were consistent with the BIA's reasonable interpretation of the statute and the BIA's own regulations. *Id.* at 8a-9a.

The court of appeals noted that the Third Circuit had come to a different conclusion in *Luciana*. The Third Circuit in *Luciana*, however, did not have an agency decision on point before it, so it came to its conclusion without any consideration of "agency deference." Pet. App. 10a.

ARGUMENT

The court of appeals decision is correct. Petitioner claims there is a conflict between the decision below and the Third Circuit on the question whether 8 U.S.C. 1158(d)(6) permits an IJ to make a frivolousness finding in connection with an asylum application when that application is untimely filed. In fact, there is no split on that question, as the Third Circuit expressly declined to reach it. The two courts did interpret an implementing regulation differently, but the Third Circuit reached its conclusion in the absence of any interpretation of the regulation by the BIA. The court of appeals here properly deferred to that administrative interpretation, and the Third Circuit should do so as well in a future case. The disagreement between the circuits could thus prove ephemeral and does not merit this Court's attention.

1. The Sixth Circuit in this case properly deferred to the BIA's interpretation of both the INA and its implementing regulations. First, the court of appeals held that the BIA reasonably concluded that nothing in the INA "'divest[s] * * * authority to make a finding of frivolousness' on a statutorily barred application." Pet. App. 8a (brackets in original) (quoting *id.* at 18a); see *id.* at 5a; *Negusie* v. *Holder*, 129 S. Ct. 1159, 1163 (2009)

("[T]he BIA is entitled to deference in interpreting ambiguous provisions of the INA."). Second, the court of appeals concluded that the BIA had reasonably construed 8 C.F.R. 1208.20, which provides that "[a]n asylum application is frivolous if any of its *material* elements is deliberately fabricated." Pet App. 7a-8a (internal quotation marks omitted) (quoting 8 C.F.R. 1208.20). In the court of appeals' view, the BIA reasonably concluded that the statutory timeliness bar does not render a "deliberately fabricated element of the claim * * * not 'material' within the meaning of 8 C.F.R. § 1208.20 * * * [,] particularly since the fabricated material element could also influence a grant of withholding of removal or protection under the Convention Against Torture." *Id.* at 8a-9a (brackets in original) (citation omitted).

Contrary to petitioner's suggestion (Pet. 5), there is no disagreement between the Sixth Circuit and the Third Circuit on the first question—the meaning of the INA—because the Third Circuit expressly declined to reach it. In *Luciana* v. *Attorney General of the United States*, 502 F.3d 273 (2007), the Third Circuit granted a petition for review and vacated a frivolousness finding because it "conclude[d] as a matter of law that [the asylum applicant's] petition was not frivolous." *Id.* at 274. In reaching that conclusion, the Third Circuit said it "need not consider whether 8 U.S.C. § 1158 provides authority to issue a frivolousness finding in the context of an untimely asylum application." *Id.* at 280. There is therefore no circuit conflict on this question; the only two courts of appeals to address the question are in agreement. Compare Pet. App. 5a, 8a, with *Mingkid* v. *United States Att'y Gen.*, 468 F.3d 763, 768 (11th Cir. 2006) ("[W]e find nothing, jurisdictional or otherwise,

that divests an [IJ] of the authority to enter a ruling of frivolousness on an application for asylum that was found to be untimely.").

The difference in outcome between the Sixth and Third Circuits turns not on an interpretation of the INA but instead on the meaning of an implementing regulation. That regulation provides in relevant part that "an asylum application is frivolous if any of its *material* elements is deliberately fabricated." 8 C.F.R. 1208.20 (emphasis added). In *Luciana*, the Third Circuit held that the false statement at issue in that case was not "material" within the meaning of the regulation. 502 F.3d at 280 (Because the asylum application was untimely, "[e]vidence going to the merits of the application—such as [the applicant's] story about the stabbing—was of no consequence, no matter how persuasive or compelling it might have been."). When the Third Circuit reached this conclusion, there was no BIA decision on point and that court thus "did not consider a dispositive ground for embracing the [BIA's] decision—agency deference." Pet. App. 10a.

The Sixth Circuit in this case did consider the "dispositive ground" absent from the Third Circuit's decision in *Luciana*, because by the time of the Sixth Circuit's decision, the BIA had addressed the meaning of 8 C.F.R. 1208.20. See Pet. App. 17a-18a (explaining that a falsehood could be "material" for purposes of the regulation even if the application to which it pertained was untimely, and "disagree[ing]" with the Third Circuit's contrary view in *Luciana*). The question thus came to the Sixth Circuit in an entirely different posture than it had come to the Third Circuit.

Courts give "substantial deference to an agency's interpretation of its own regulations." *Thomas Jeffer-*

son Univ. v. *Shalala*, 512 U.S. 504, 512 (1994). "[T]he agency's interpretation must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Ibid.* (internal quotation marks and citation omitted). While the Third Circuit reviewed the meaning of 8 C.F.R. 1208.20 "*de novo*," *Luciana*, 502 F.3d at 278-279, the Sixth Circuit correctly recognized that it was required to give "controlling weight" to the BIA's interpretation of its own regulation unless that interpretation was "plainly erroneous or inconsistent with the regulation," Pet. App. 9a (quoting *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 414 (1945)).

Because the Third Circuit's decision was issued before the BIA's contrary interpretation of the regulation, that court will be required to revisit this issue if it is presented in the future. See *National Cable & Telecomms. Ass'n* v. *Brand X Internet Servs.*, 545 U.S. 967, 982-983 (2005) (*Brand X*). As *Brand X* explained, an agency is permitted to interpret an ambiguous statute and come to a conclusion contrary to that of a court of appeals about its meaning. See *id.* at 982. When an agency does so, the court of appeals' only task in a subsequent case is to determine whether the agency's construction is reasonable; the court may not consider its own precedent on the best interpretation of the ambiguous statute controlling on that question. See *id.* at 982-983.[2] *Brand X* involved an agency's interpretation of a statute, but the same rule would clearly apply to an

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[2] The only exception to this rule is when the prior court of appeals decision "hold[s] that the statute unambiguously forecloses the agency's interpretation, and therefore contains no gap for the agency to fill." *Brand X*, 545 U.S. at 982-983. That exception would not apply here; the Third Circuit noted that "[n]either the relevant statute nor the regulations define material." *Luciana*, 502 F.3d at 280.

agency's construction of its own regulation, because the judicial deference owed the agency in that situation is even greater.

Because the Third Circuit has never decided whether the BIA's interpretation of its frivolousness regulation is reasonable, it has not passed on the question actually decided by the court of appeals below. When the Third Circuit has occasion to do so, that court may conclude that the BIA's interpretation is reasonable, thus eliminating any difference between the two circuits. Review by this Court of this question now would thus be premature.[3]

2. The court of appeals' decision is correct. The court properly deferred to the Board's reasonable interpretation of its own regulation to mean that a deliberate fabrication in an asylum application remains material under 8 C.F.R. 1208.20 even when that application is untimely. See Pet. App. 17a-18a (BIA); *id.* at 7a-9a (court of appeals). As an initial matter, the premise of the contrary view—that a false statement going to the merits of an untimely application for asylum is "of no consequence, no matter how persuasive or compelling it might have been," *Luciana*, 502 F.3d at 280—is wrong. Apart from the request for asylum, "the fabricated material element could * * * influence a grant of withholding of removal or protection under the Convention Against Torture." Pet. App. 18a; see *id.* at 8a-9a. Petitioner's fabrications thus had the capability of influencing the agency's action with respect to his other requests for relief.

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[3] Even if the Third Circuit ultimately found that the BIA's interpretation of the regulation is unreasonable (while again not reaching the statutory question), the split could be resolved by the agency, which could amend the regulation.

Moreover, the BIA's interpretation of the regulation would be reasonable even without the possible impact of a false statement on other grounds for relief. A rule prohibiting frivolousness findings when an asylum application fails for some other reason would "allow an alien to file an untimely application for asylum that contained deliberately fabricated material elements because there would be no penalties for doing so." Pet. App. 18a (citing *Mingkid*, 468 F.3d at 768). Additionally, there would be no logical stopping point to such a rule. "If the Third Circuit is right that a frivolousness finding is no longer 'material' once the [IJ] decides that it is time barred, the same would be true if the judge decided that the application failed on a distinct merits ground, whether related to the underlying frivolousness finding or not." *Id.* at 11a. "But [IJs] frequently offer a host of merits-related grounds for rejecting an asylum application, and they should be permitted to do so without compromising their authority to make a frivolousness finding when appropriate." *Ibid.* The result of a rule immunizing such applications from a frivolousness finding would be to increase the volume of frivolous applications. See *id.* at 25a.

Finally, the BIA's conclusion that a false statement in an untimely application for asylum can be "material" is consistent with the rule followed by courts in assessing materiality for purposes of the false statement statute, 18 U.S.C. 1001. See, *e.g.*, *United States* v. *Quirk*, 266 F.2d 26, 27 (3d Cir. 1959) (per curiam) ("[T]he wilful submission of the false document was * * * calculated to induce agency reliance or action, irrespective of whether actual favorable agency action was, for other reasons, impossible and so established the materiality of the submitted application.") (internal quotation marks and citation omitted); *United States* v. *Valdez*, 594 F.2d

725, 728-729 (9th Cir. 1979) (same); *United States* v. *Edgar*, 82 F.3d 499, 510 (1st Cir.) ("Edgar argues that * * * because the forms were filed late, his failure to set forth his self-employment was not material. However, the standard is not whether there was actual influence, but whether it would have a tendency to influence."), cert. denied, 519 U.S. 870 (1996).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General
TONY WEST
Assistant Attorney General
DONALD E. KEENER
JOHN W. BLAKELEY
Attorneys

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